No. 85-718

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN METHYL CORPORATION,
Petitioner,

v.

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 23, 1985

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QUESTIONS PRESENTED

1. Whether a fuel waiver granted by the Environmental Protection Agency under section 211(f)(4) of the Clean Air Act, 42 U.S.C. § 7545(f)(4), unsupported by any rational explanation of how the fuel concentration limits set forth in the waiver relate to vehicle emissions performance, why the fuel can be presumed to have no effects on emissions over a vehicle's useful life, or why the fuel's failure of the agency's own test criteria should be ignored, may be reversed and vacated upon judicial review?

2. Whether a fuel waiver held to be unlawful by the Court of Appeals may be reversed and vacated upon judicial review pursuant to section 307 of the Clean Air Act, 42 U.S.C. § 7607, without the need for further rulemaking proceedings pursuant to section 211(c) of the Act, 42 U.S.C. 7545(c)?

PARTIES TO THE PROCEEDINGS

Respondents Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Chrysler Corporation, General Motors Corporation, and Volkswagen of America, Inc. were the petitioners in the Court of Appeals. Respondent in the Court of Appeals was the Environmental Protection Agency (EPA) which issued the final determination reviewed by the Court of Appeals. American Methyl Corporation, petitioner herein, was an intervenor on the side of EPA below. There are no other parties to this case.

Pursuant to Supreme Court Rule 28.1, the Court is advised that the Motor Vehicle Manufacturers Association of the United States, Inc., is an incorporated not-for-profit trade association which has no parent companies, subsidiaries or affiliates. Its members are:

AM General Corporation
American Motors Corporation
Chrysler Corporation
Ford Motor Company
General Motors Corporation
Honda of America Mfg., Inc.
International Harvester Company
M.A.N. Truck & Bus Corporation
PACCAR Inc
Volkswagen of America, Inc.
Volvo North America Corporation

The parent companies and non-wholly owned subsidiaries and affiliates of each member of the Motor Vehicle Manufacturers Association of the United States, Inc. that is a respondent in this case are listed below under the name of the related respondent:

AMERICAN MOTORS CORPORATION
American Motors Financial Corp.
Regie Nationale des Usines Renault

CHRYSLER CORPORATION
Peugeot, S.A. (France)
Mazerati Officini Afairi, S.p.A. (Italy)
Chrysler de Mexico, S.A. (Mexico)
Diamond Star Motors Corp. (U.S.A.)
Mitsubishi Motors Corp. (Japan)

Chrysler Corporation has other non-wholly-owned subsidiaries and unconsolidated subsidiaries which are located in the United States and in foreign countries which number in the hundreds. However, the majority nave the Chrysler name incorporated therein.

GENERAL MOTORS CORPORATION
Aralmex, S.A. de C.V. (Mexico)
Automotriz Gencor S.A. (Ecuador)
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)
Companis Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)
Compresores Delfa, C.A. (Venezuela)
Convesco Vehicle Sales GmbH (West Germany)
Daewoo Motor Co., Ltd. (Korea)
DHB – Componentes Automotives S.A. (Brazil)
Fabrica Colombiana de Automotores S.A. ("Colomotores") (Columbia)
General Motors de Colombia S.A. (Columbia)
General Motors Egypt, S.A.E. (Egypt)
General Motors Iran Limited (Iran)
General Motors Kenya Limited (Kenya)
GM Allison Japan Limited (Japan)
GM Fanuc Robotics Corp. (USA)
Industries Mecaniques Maghrebires, S.A. (Tunisia)

Industrija Delova Automobila, Kikinda (Yugoslavia)
Isuzu Motors Limited (Japan)
Isuzu Motors Overseas Distribution Corp. (Japan)
Kabelwerke Reinshagen GmbH (West Germany)
Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)
Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)
Moto Diesel Mexicana, S.A. de C.V. (Mexico)
Motor Enterprises, Inc. (USA)
New United Motor Manufacturing, Inc. (USA)
Omnibus BB Transportes, S.A. (Ecuador)
Promotora de Partes Electronicos Automotrices (Mexico)
P.T. Mesin Isuzu Indonesia (Indonesia)
Senalizacion y Accessorios del Automobil Yorka, S.A. (Spain)
Suzuki Motor Co., Ltd. (Japan)
Unicables, S.A. (Spain)

VOLKSWAGEN OF AMERICA, INC.
Volkswagen AG
Deutsche Automobil G.m.b.H.
AUDI NSU AUTO UNION AG
TAS Tvornica Automobila Sarajevo
WESER-EMS Vertribes G.m.b.H.
Forjaria Sao Bernardo S.A.
Companhia Vale do Rio Cristalino S.A.
InterRent Trucks S.A.
TRIUMPH-ADLER AG
Adlerwerke vorm. Heinrich Kleyer AG
Volkswagen do Brazil, S.A.
Volkswagen Argentina

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Chrysler Corporation, General Motors Corporation and Volkswagen of America, Inc. (collectively "MVMA"), respectfully request the court to deny the petition for a writ of certiorari to review the judgment, opinion and order of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is published at 768 F.2d 385 and is reprinted in the Petitioner's Appendix (Pet. App.) A, (Pet. App. 1a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

Section 211(f) of the Clean Air Act[1] prohibits the introduction into commerce of any new motor fuel or fuel additive (collectively referred to as "new fuels") unless it is substantially similar to those used in certifying that a 1975 or later model year vehicle or engine complies with applicable emission standards. Section 211(f)(4) permits the EPA Administrator to waive this prohibition under certain conditions:

> The Administrator, upon application of any manufacturer. . .may waive the prohibitions. . .if he determines that the applicant has established that such fuel or fuel additive or a specified concentration thereof, and the emission products of such fuel or additive or specified concentration thereof, will not cause or contribute to a failure of any emission control device or system (over the useful life of any vehicle in which such device or system is used) to achieve compliance by the vehicle with the emission standards with respect to which it has been certified pursuant to section [206].

Pursuant to its authority to grant waivers to new fuels proven to have no detrimental effects on vehicle emissions, EPA adopted "Guidelines for Section 211(f) Waivers for Alcohol-Gasoline Blends" ("Waiver Guidelines").[2]

Early in 1981, Anafuel Corporation, now American Methyl Corporation, petitioner herein, applied for a section 211(f) waiver for its methanol-gasoline blend known

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[1] 42 U.S.C. § 7545 (f), (Pet. App., 63a). For convenience, references to sections of the Clean Air Act, 42 U.S.C. § 7401 et seq. will refer only to the Public Law section designations. Parallel citations to the United States Code are set forth in the Table of Authorities.

[2] 43 Fed. Reg. 24131, June 2, 1978, reproduced in the appendix to this brief (MVMA App., 2a).

as Petrocoal. Notice of this waiver application was published on April 13, 1981 soliciting public comments on whether Petrocoal met the statutory waiver criteria. Several of the respondents herein filed comments opposing the grant of a waiver.

By mutual consent of EPA and American Methyl, the 180-day review period was twice extended until September 28, 1981 when EPA granted a conditional waiver for Petrocoal. This decision was published in the *Federal Register* on October 5, 1981. 46 Fed. Reg. 48975 (Pet. App. 39a).

On December 4, 1981, within the time provided in section 307(b)(1) for seeking review of nationally applicable final EPA actions under the Clean Air Act, respondents filed a petition for judicial review of the EPA decision to grant a fuel waiver for Petrocoal.[3] At the same time, respondents filed a petition with EPA seeking administrative reconsideration of the waiver decision.

Petitioner American Methyl Corporation promptly intervened as a respondent in the judicial review proceeding. The matter was stayed for almost two years while the parties conducted settlement negotiations. In February of 1983, MVMA supplemented its original petition to EPA with new information relevant to the evaporative emissions effects of Petrocoal. On the basis of this new information, EPA proposed on March 16, 1984 to revoke or modify the Petrocoal waiver.[4] In light of this proposal to reconsider the Petrocoal waiver, all the parties to the judicial review proceeding, including petitioner American Methyl Corporation, joined in a motion to remand the record of the case to EPA so that the agency could take further administrative action with respect to the waiver.

[3] The MVMA petition for judicial review and a separate one filed the same day by General Motors Corporation were consolidated.

[4] Notice of this proposal was published in 49 Fed. Reg. 11879, March 28, 1984.

This motion was granted by the Court of Appeals on April 3, 1984.

One month later, however, American Methyl Corporation requested that EPA rescind its proposed revocation of the Petrocoal waiver on the ground that section 211(f) did not permit EPA to reconsider a waiver decision. When EPA refused to do so, American Methyl filed a petition for expedited review of EPA's decision. The Court of Appeals held that EPA did not have the authority to revoke a fuel waiver pursuant to section 211(f), and could only control or prohibit a fuel "in commerce" after conducting rulemaking pursuant to sesction 211(c). *American Methyl Corp.* v. *EPA,* 749 F. 2d 826 (D.C. Cir. 1984). Accordingly, the court set aside the notices of the agency proceedings proposing to revoke the waiver.

Following the *American Methyl* decision, the Court of Appeals granted MVMA's motion for return of the record on its petition for judicial review of the original waiver decision. Oral arguments were heard on May 14, 1985. At oral argument and earlier in its brief, EPA conceded that the record did not support the waiver decision. On July 26, 1985, Judge Wald, writing for a unanimous three-judge panel, found that the Administrator had acted arbitrarily and capriciously, and had abused her discretion in granting the Petrocoal waiver. Accordingly, the court vacated the Administrator's decision and remanded the matter to EPA for further proceedings consistent with its decision (Pet. App., 1a).[5]

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[5] American Methyl Corporation subsequently filed a motion for rehearing, suggesting that rehearing be *en banc.* This motion was denied September 18, 1985. On September 23, 1985, petitioner also requested the Court of Appeals to stay the issuance of the court's mandate through October 25, 1985, pending filing a petition for a writ of *certiorari.* This motion was granted on October 1, 1985 (Pet. App., 57a) and, upon the filing of the instant petition for *certiorari,* the court deferred issuance of the mandate pursuant to F.R.A.P. Rule 41(b) until final disposition by this Court (MVMA App., 1a).

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals, characterized by petitioner as raising an issue of "first impression" (Pet. 20), was properly decided. It does not conflict with either the Clean Air Act or any decision of this or any other court. Moreover, far from establishing any need for definitive guidance from this Court with respect to an important federal question of far-reaching scope and special significance, petitioner's arguments belie a simple, fact-bound dispute.

From the outset, MVMA's member companies have vigorously objected to a fuel waiver for Petrocoal. Judicial review was promptly sought. The Court of Appeals has now determined that the Petrocoal waiver should never have been granted because petitioner failed to establish that Petrocoal met the criteria to qualify for the Clean Air Act waiver. From the time of the waiver decision in 1981 until now, the petitioner has been able to reap the benefits of an unlawful waiver. As a consequence, the EPA waiver decision created the very peril which Congress sought to eliminate when it prohibited introduction of new fuels unless they were shown to have no detrimental effect on vehicle emissions and, correspondingly, on the nation's air quality.

Without in any way ameliorating the defects in the waiver decision delineated by the Court of Appeals, petitioner has attempted to portray the court below as having applied an inappropriate standard of review to the agency decision. Alternatively, petitioner argues that even conceding the invalidity of the waiver, petitioner should be entitled to continue to benefit from EPA's arbitrary and capricious action while the agency conducts yet another rulemaking proceeding, under substantively different statutory criteria than those construed by the Court of Appeals, as if the waiver decision had never been reviewed and vacated.

The court below found three independent bases for concluding that the Administrator's decision was "arbitrary, capricious and an abuse of discretion." American Methyl addresses only one of those grounds in its petition while ignoring the other two, either of which would provide a basis for vacating the waiver decision.

The standard of review applied by the court in its review of the administrative record is well-established and fully consistent with applicable provisions of the Clean Air Act. Having found that the waiver was unlawful, the court properly vacated the agency decision.

I. THE POWER OF THE COURT OF APPEALS TO REVERSE EPA'S DECISION TO GRANT A FUEL WAIVER FOUND TO BE ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION IS WELL ESTABLISHED AND FULLY CONSISTENT WITH APPLICABLE PROVISIONS OF THE CLEAN AIR ACT.

The question presented by petitioner is whether EPA can revoke a fuel waiver without resort to rulemaking under section 211(c) of the Act. That question, and the related discussion set forth in the petition itself (Pet. 11-14), are irrelevant to a review of the decision in this case. Petitioner's formulation of the question completely fails to distinguish between: (1) a case in which EPA, by administrative initiative and without benefit of judicial review, seeks to undo a previous decision to grant a fuel waiver by administrative action; and (2) a case in which a grant of a fuel waiver is held unlawful upon judicial review and is vacated by the court of appeals. In the former situation, it is clear that EPA may control or prohibit a fuel only through a section 211(c) proceeding. Indeed, this was the holding in the *American Methyl* decision, *supra,* more fully discussed in Part III of this brief. However, that is not the situation in this case.

In this case, the Court of Appeals, after reviewing the merits of EPA's decision to grant a fuel waiver for Pet-

rocoal pursuant to section 211(f)(4), found the decision to be arbitrary, capricious and an abuse of discretion. Accordingly, the court vacated the EPA decision.

Under both the Clean Air Act and the Administrative Procedure Act, the reviewing court may properly reverse any action of the Administrator found to be arbitrary.[6] Section 307(d)(9) of the Clean Air Act provides, in relevant part:

> In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be –
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;

Similarly, the judicial review provision applicable to informal agency action under the Administrative Procedure Act, 5 U.S.C. § 706, states in pertinent part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
>
> * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> * * *

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[6] The Court of Appeals considered, but found it unnecessary to decide whether the judicial review provision of the Clean Air Act, section 307(d)(9), or of the Administrative Procedure Act, 5 U.S.C. § 706, governed the standard of review applicable to the waiver decision because the standard (i.e. whether EPA's actions were in excess of statutory authority or arbitrary or capricious) was the same under either Act (Pet. App. 8a, fn 6).

There can be no question that the Court of Appeals had authority to reverse EPA's waiver decision. Yet, petitioner's argument that the only recourse in this case *even if the waiver were properly held unlawful* is further EPA rulemaking pursuant to section 211(c) would render that authority and the judicial review provisions of the Act a nullity.[7] EPA's authority to conduct rulemaking to regulate a fuel pursuant to section 211(c) is independent of the fuel waiver process under section 211(f) since the Agency, upon making the requisite findings set out in section 211(c), may regulate any fuel in commerce at any time, including one which previously received a section 211(f) waiver. Whether such a waiver was lawfully granted or not is completely irrelevant for purposes of section 211(c) rulemaking. Thus, the effect of remanding this case for EPA rulemaking under section 211(c) would be the same whether EPA's waiver decision were reversed or sustained by the court below. There is simply no support for the proposition that the only relief a reviewing court can order is another, substantively different rulemaking proceeding.

The "unambiguously expressed intent of Congress" (Pet. 14) set forth in the judicial review provisions of the Act, far from mandating the anomalous result suggested by petitioner, dictates that EPA waiver decisions be subject to judicial review and be reversed if found arbitrary or capricious. This is what happened in the court below and the result is fully consistent with the Clean Air Act and this Court's decision in *Vermont Yankee Nuclear Power Corp v NRDC,* 435 U.S. 519 (1978). In that case, the Court

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[7] Section 211(c), while related to section 211(f) in that the principal focus is a fuel's effect on air pollution, contains additional substantive criteria for regulation (*e.g.,* cost-benefit analysis of alternative control strategies, section 211(c)(2)(B)) and is procedurally "more cumbersome" than section 211(f). *American Methyl,* 749 F.2d at 840. The full text of section 211 is reproduced in Pet. App. G, 58a *et seq.*

held that when an agency's action "is not sustainable on the administrative record made, then the [agency's] decision must be vacated and the matter remanded to [the agency]" – but the court should not otherwise intrude into the administrative process. 435 U.S. at 549.

The fact is that the court below followed *Vermont Yankee's* instructions to the letter. Indeed, the court expressly provided the agency another opportunity to make a "reasoned decision" to grant the waiver (Pet. App. 36a) for what was clearly the benefit of petitioner. There is nothing in the Clean Air Act to suggest that a reviewing court can find an agency's decision invalid, but is powerless to reverse or vacate that invalid agency action. Moreover, it is presumptious for the party which stands to benefit from the court's direction on remand to now attempt to use it as a ground for seeking *certiorari*.

II. THE COURT OF APPEALS APPLIED THE STANDARD APPROPRIATE FOR REVIEW OF THE ENVIRONMENTAL PROTECTION AGENCY'S APPLICATION OF THE FUEL WAIVER CRITERIA UNDER THE CLEAN AIR ACT.

A. In Making Its Own Independent Judgment as to Whether the Environmental Protection Agency's Concession of Error was Warranted, the Court of Appeals Correctly Declined to Infer the Agency's Reliance on Data Upon Which the Agency Itself Did Not Purport to Rely.

Petitioner's claim that the Court of Appeals disobeyed the "dictates of this Court regarding the scope of judicial review of administrative decisions" (Pet. 17) is baseless. Petitioner does not take issue with the standard of review expressly applied by the Court of Appeals. Rather, petitioner resorts to a fact-bound quarrel with the court's conclusion that the agency's unexplained departure from its general waiver guidelines and reversal of course from

established decisional criteria were arbitrary and capricious. Further review by this Court of the factual record would hardly be justified in any case; in the context of the Petrocoal waiver record's dearth of evidence or argument to support key elements of the EPA decision such review is clearly unwarranted.

The standard of review appropriate for the EPA waiver decision at issue in this case is well-recognized. Whether judicial review is conducted pursuant to provisions of the Clean Air Act or the Administrative Procedure Act[8] the agency action must be reversed if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[9]

This is precisely the standard of review that the court below applied to the EPA's implementation of the fuel waiver provisions in this case (Pet. App. 8a). Moreover, the court agreed with American Methyl Corporation's assertion that it was not bound by EPA's concession of

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[8] As the court below noted, the standard in either case is the same. See note 4, *supra*.

[9] Section 307(d)(9)(A); *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 414 (1971), *citing* 5 U.S.C. § 706(2)(A). Accordingly, it is incumbent upon EPA to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'." *Motor Vehicle Mfgrs. Assn. v. State Farm Mut.* 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States,* 371 U.S. 156,168 (1962)). A factual decision made by an Agency is to be subjected by the court to "a thorough, probing, in-depth review" in order to determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415, 416 (1971).

error.[10] However, in making its own independent judgment as to whether EPA's concession was warranted, the Court of Appeals correctly declined to infer that the agency relied on data which EPA did not cite as a consideration in its decision.

> The evidence in the record and the Administrator's decision are simply not of the nature which would warrant this court attributing to the Administrator reasons not even hinted at in the decision.

(Pet. Appl. 24a, n. 20). The Court of Appeals is not required to substitute blind deference to the agency decision for its own review of the factual record, particularly when the agency contravenes its own guidelines for action.[11] EPA's waiver decision did not merely suffer from a lack of "ideal clarity" (Pet. 18), but failed, as the agency conceeded in this case, to explain a number of the most critical factors upon which emissions performance is dependent (Pet. Ap. 23a, n. 19). The agency also failed to explain its departure from prior norms.

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[10] EPA conceded that "the record does not appear to support [the alcohol concentration] limits" and "does not appear to support key elements of the waiver" (Pet. App. 24a).

[11] "A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a *presumption* that those policies will be carried out best if the settled rule is adhered to. *From this presumption flows the agency's duty to explain its departure from prior norms." Atchison, Topeka & Santa Fe Ry Co. v. Wichita Bd. of Trade,* 412 U.S. 800, 807-08 (1973) (emphasis added).

B. On The Facts of The Petrocoal Waiver The Court of Appeals Correctly Found EPA's Waiver Decision To Be Arbitrary and Capricious and Properly Vacated The Waiver.

The Court of Appeals found the Petrocoal waiver decision to be arbitrary and capricious for three independent reasons: (1) EPA "lacked any rational basis for concluding that Petrocoal will not cause or contribute to a vehicle's failure to comply with emissions standards over its useful life" (Pet. App. 16a); (2) the record did "not support the maximum limits [of Methanol and other alcohols in the fuel blend] allowed by the waiver" (Pet. App. 26a); and (3) the "Administrator... failed to articulate any plausible reason why the established test criteria do not accurately reflect the emissions effects due to Petrocoal" [to justify disregarding Petrocoal's failure of the test for NO_x emissions] (Pet. App. 31a).[12]

Of these three grounds, petitioner raises a factual dispute only with regard to the last (failure of the test for oxides of nitrogen (NO_x) emissions). Petitioner contends that the Court of Appeals' conclusion contradicts the guidelines for review set forth in *Motor Vehicle Manufacturers Association v. State Farm Mutual,* 463 U.S. 29 (1983), which admit of agency latitude to adapt their rules

[12] The Court of Appeals recognized that the various errors identified in the waiver decision cast doubt on other portions of the record cited in support of the Petrocoal waiver. Thus "...the fact the "worst case" [maximum methanol limits] fuel might not have been tested casts doubt on the confidence we may place in any of the test results on Petrocoal cited to support the waiver decision" (Pet. App. 26a). Similarly, "...even if we accepted the validity of the conclusion [that durability tests were unnecessary], Petrocoal failed – albeit marginally – the Deteriorated Emissions Test performed in lieu of 50,000-mile testing. Under these circumstances, we have no doubt that the EPA abused its discretion in determining that Petrocoal will not cause a vehicle to exceed the emission standards over its useful life." (Pet. App. 16a).

to the demands of changing circumstances (Pet. 15-16). However, as the court below clearly explained, the Administrator acknowledged the failure to meet the NO_x emission requirement with Petrocoal, but serendipitously dismissed the failure as not being a significant one. It was the Administrator's purely subjective evaluation of the degree of failure which led the court to conclude:

> The Administrator may not simply subjectively without a reasoned explanation conclude that a failure of the EPA's established criteria is not significant. Section 211(f)(4) speaks in terms of "a failure" to achieve compliance with the emissions standards. We find nothing in the Act or its legislative history to support the Administrator's added gloss that the relevant question is whether the fuel will cause or contribute to a "significant failure". (Citation omitted). We conclude that on the record in this case the Administrator acted arbitrarily, capriciously, and abused her discretion in granting the Petrocoal waiver despite Petrocoal's failure of the Deteriorated Emissions for NO_x emissions. (Pet. App. 32a).

It is hardly surprising that the court below found EPA's decision with respect to NO_x failures arbitrary. In assessing the emissions effects of Petrocoal, EPA itself selected the test procedure to be applied, defined the pass and fail criteria and, after Petrocoal failed the test, chose to disregard the result despite the fact that the waiver "applicant has the burden of proving that such harm will not occur" (Pet. App. 32a). EPA offered no explanation of "what factors or circumstances the Administrator relied on as justification for her deviation from the established criteria in the case of Petrocoal" (Pet. App. 32a, fn 25).[13]

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[13] In fact, "...even the EPA, while arguing that the Administrator could deviate from the established criteria given a reasoned explanation, conceded that the Administrator gave no such reasoned explanation in this case " (Pet. App. 30a).

C. The Court of Appeals Found Independent Grounds to Hold the Waiver Arbitrary and Capricious In Addition To That Raised in the Petition .

The court below, after examining the factual record, found it lacking to such a degree that it expressed doubt that EPA, on remand, could "make a reasoned decision to grant the Petrocoal waiver" (Pet. App. 36a). As discussed *supra,* the court found two wholly independent reasons for vacating the Administrator's decision in addition to the failure for NO_x emissions discussed in the petition. Petitioner has failed to explain how the outcome of this case would have been any different even if the court below had accepted its arguments with regard to the NO_x failure. Since those additional reasons have not been placed in controversy by the petition, we set forth here only a brief description of these two independent bases for finding that the waiver was unlawful.

The court below recognized that section 211(f)(4) requires that EPA determine that a fuel will not cause or contribute to a failure of an emission device to comply with applicable emission standards during a vehicle's 50,000 mile useful life (Pet. App. 15a). In the absence of actual data showing the presence or absence of such effects, EPA must have a rational basis for determining whether a fuel will comply with this criterion. The only rationale offered by EPA for its conclusion that durability data were unnecessary rested entirely on three of its previous waiver decisions which, the court determined, could "in no way be construed to provide a reasonable basis for the EPA's conclusion that Petrocoal – a fuel containing up to 12 percent methanol – would have only instantaneous, not deteriorative [*i.e.,* changing over time], effects" (Pet. App. 22a).

Similarly, the maximum concentration limits established by the waiver (12 percent methanol, 15 percent total alcohol, Pet. App. 5a) were found to be totally unsup-

ported by any data in the record on the emissions effects of the "worst case" fuel, as even EPA conceded (Pet. App. 24a). In short, the waiver decision fits squarely into circumstances described in *Motor Vehicle Manufacturers Association* cited by petitioner (Pet. 17) in which an agency action would be arbitrary and capricious: the EPA, in subjectively assessing the degree of Petrocoal's failure for NO_x emissions, relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem of the maximum concentration limits, and offered explanations for its decision to forgo testing of the durability (useful life) effects of Petrocoal that ran counter to the evidence before the agency.

III. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS AND ITS EARLIER DECISION IN AMERICAN METHYL

In a final effort to bring this case within the criteria of Rule 17 for *certiorari* review, petitioner contends that the decision of the court below is in "direct conflict" (Pet. 18) with the Court of Appeals' 1984 decision in *American Methyl, supra.*[14] While this purported conflict *within the same* federal circuit may have the distinction of being one of the more novel theories urged as a basis for seeking *certiorari,* it suffers from a fundamental improbity -- there is no conflict between the two decisions.

In the *American Methyl* case, the court considered the authority of EPA to revoke a waiver administratively pursuant to section 211(f) of the Act, "based entirely on new evidence" after the fuel was "in commerce." 749 F.2d at 834. The court held that the EPA Administrator "may not revoke the Petrocoal waiver pursuant to section 211(f), but may forbid the marketing of Petrocoal only pursuant to

[14] This was also the principal argument which petitioner unsuccessfully advanced in seeking *en banc* rehearing in the Court of Appeals.

his [sic] authority to control or prohibit fuel and fuel additives under section 211(c)." 749 F2d at 831. Contrary to petitioner's argument (Pet. 18), the *American Methyl* case did not involve "basically the same issues as were decided in this case for which *certiorari* is sought."

The Court of Appeals considered the following three issues in *American Methyl:* "first, is judicial review appropriate at this stage in the administrative process; second, should American Methyl be estopped from challenging EPA's assertion of revocation authority; and third, does section 211(f) of the Clean Air Act empower EPA to revoke the Petrocoal waiver?" *Id.* These are hardly "basically the same issues that were decided in this case for which certiorari is sought" (Pet. 18).[15]

The lawfulness of the original Petrocoal waiver decision clearly was not an issue before the court in *American Methyl.* This was expressly noted in the following two excerpts from the *American Methyl* opinion:

> ...there is no issue before us as to the original administrative record justifying the Petrocoal waiver...;

and

> ...no issue before us as to the adequacy of the original waiver.

749 F.2d at 837. Additionally, in the opinion authored by Judge Wald who was a member of the panel for both *American Methyl* and the case below, it was expressly stated:

---

[15] Petitioner also states that *American Methyl* "involved all of the parties to this case and no others" (Pet. 18). In fact, parties to *American Methyl* who are not parties to the instant litigation included intervenors Automobile Importers of America, Inc. and United American Fuels, Inc.

> In *American Methyl,* this court held that EPA had no inherent authority to reconsider or revoke a waiver under section 211(f)(4) but must instead proceed to prohibit or regulate the fuel under section 211(c). *American Methyl,* 749 F2d at 831. The court explicitly stated that the issue of the original waiver was not before the court. *Id.* at 837.

(Pet. App. 26a).

The American Methyl petition also suggests that the earlier case disposed of arguments relating to the proposed grounds for revocation examined by the court below in its judicial review of the original waiver decision, by characterizing them as "make-weights" and "red herrings" (Pet. 19). However, such an argument completely ignores the context of those characterizations in *American Methyl.* The court's reason for discussing these issues in the earlier case was to demonstrate that EPA's principal motivation in proposing to revoke the waiver was "new evidence" relating to hydrocarbon evaporative emissions, and not a deficiency in the agency's original waiver decision. This is clear from the following language from the opinion of the case below:

> The [*American Methyl*] court determined, however, that the EPA's actions and the chronology of events leading up to the proposed revocation was new evidence relating to Petrocoal's effect on evaporative emissions of hydrocarbons and not any purported defects in the original waiver. Id. The court then went on to characterize the EPA's assertion of deficiencies in the record supporting the original waiver grant as "make-weights" and "red herrings". Id. at 837-38. Contrary to American Methyl's contention, however, the court characterized the EPA's claims that it sought revocation due to the incorrectness of the original waiver as "make-weights" and "red herrings", not because the claims per se lacked merit, but because they lacked merit as purported reasons for the proposed revocation proceeding (Pet. App. 27a).

Therefore, the court's consideration of these factors in the judicial review of the original waiver is not in conflict with their characterization as "make-weights" and "red herring" arguments in the context of the *American Methyl* case.

In conclusion, the decision below is not in any way in conflict with the same court's prior decision in *American Methyl.* It is also consistent with the policy arguments cited by petitioner (Pet. 20). The power of the Court of Appeals to review and reverse unlawful action of EPA is fundamental to the implementation of the goals of the Clean Air Act and "comports with basic fairness" to fuel manufacturers (Pet. 20). MVMA's petition for judicial review was filed within 60 days of publication of the Petrocoal waiver decision. Petitioner American Methyl Corporation became a party to the case at its earliest stage and participated in all the developments leading to the resolution of this case by the court below.

This is not, then, a case wherein a fuel manufacturer is charged with knowing "ex ante whether his product would be available for sale for a sufficient time to recoup his initial investment" (Pet. 20). The risk assumed by petitioner is that of any applicant for a fuel waiver and petitioner has no basis to claim a vested right to an unlawful agency decision, especially when that decision might have grave consequences to the nation's air quality and can result in damage to vehicles.

The real issue in this case was whether EPA's decision to grant a fuel waiver for Petrocoal was arbitrary, capricious, or an abuse of discretion. As this court has often repeated, that kind of fact-based inquiry is one which "Congress has placed in the keeping of the Courts of Appeals," and in which "[t]his Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Mobile Oil Corp. v. FPC,* 417 U.S. at 310. See

American Textile Mfrs. Inst. v. Donovan, 425 U.S. 490 (1981); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 491 (1951). As the foregoing analysis of the facts actually before the Court of Appeals has made manifest, this is not that kind of case.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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December 23, 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1985

No. 81-2276

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

AMERICAN METHYL CORPORATION,
Intervenor

AND CONSOLIDATED CASE NO. 81-2279

ORDER

On October 1, 1985, this Court entered an order withholding issuance of its mandate herein "through October 25, 1985". Thereafter, by order entered October 28, a motion previously filed by intervenor American Methyl Corporation, requesting a further stay of mandate, was denied. The Clerk has been informed orally by the Office of the Clerk of the Supreme Court of the United States that on October 25, 1985, intervenor American Methyl Corporation filed a petition for a writ of certiorari. It is expected

that written confirmation will follow. Accordingly, it appears that there has been substantial compliance by intervenor American Methyl Corporation with the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure. Upon consideration of the foregoing, it is

ORDERED, that the Clerk shall defer issuance of the mandate in accordance with the requirements of Rule 41 (b), Federal Rules of Appellate Procedure.

For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

[Filed October 31, 1985]

APPENDIX B

ENVIRONMENTAL PROTECTION AGENCY

[FRL-904-6]

OFFICE OF ENFORCEMENT

Guidelines for Section 211 (f) Waivers for Alcohol-Gasoline Blends

AGENCY: Environmental Protection Agency

ACTION: Notice

SUMMARY: The Clean Air Act Amendments of 1977 added section 211(f), which prohibits or limits the use of certain fuels and fuel additives, including alcohol-gasoline blends. Section 211(f) also provides for waivers of these prohibitions and limitations if a fuel or fuel additive manufacturer can show that a fuel or fuel additive will not cause or contribute to the failure of any emission control device or system installed on vehicles or engines to achieve compliance with applicable emission standards.

Pursuant to section 211(f), the Administrator has 180 days after receipt of an application within which to grant or deny a waiver. If the Administrator does not act within 180 days, the application for waiver shall be treated as granted.

These Guidelines are being published in order to facilitate waiver application and review for alcohol-gasoline blends, in particular Gasohol. The Guidelines also establish procedures for the waiver process.

FOR FURTHER INFORMATION CONTACT: George Y. Sugiyama, Attorney-Advisor, Mobile Source Enforcement Division (EN-340), U.S. Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460, 202-755-2848.

SUPPLEMENTARY INFORMATION: Guidelines: Section 211(f)(4) Waivers

I. Applications for Waivers and Burden of Proof

All requests for a waiver, the supporting data, and the contents of all related submittals should be public information and therefore releasable to any party requesting such data. Should an applicant for a waiver desire to assert a claim of business confidentiality or trade secret information over any part of an application requesting a waiver, such assertion should only be made if the failure to submit such information would seriously jeopardize the success of the application and the release of such information will cause significant harm to the applicant.

Applications for waivers should be submitted only by manufacturers of fuels or fuel additives. Requests for waivers by individuals or organizations who are not manufacturers will not be considered a sufficient request for waiver such as to initiate the 180 day review period provided by section 211(f)(4). For purposes of initiating the 180 day requirement, an application will be considered to be received on the date it is delivered to the Director, Mobile Source Enforcement Division. Use of certified (return receipt) or registered mail is encouraged.

The Administrator may waive the section 211(f) prohibitions and restrictions if he "determines that the *applicant has established*" (emphasis supplied) that the fuel additive in question will not cause the effects described in section 211(f)(4). The burden of performing tests and furnishing data and evidence is upon the applicant. Applications which are not accompanied by any evidence as to the effects of a fuel additive upon the emissions performance of the national automobile fleet will be denied. Any waiver granted to one manufacturer will be applicable to any manufacturer similarly situated. Multiple applications for the same waiver are not necessary and are discouraged unless based on different or additional information.

II. Definitions

A. Substantially Similar

A fuel additive is not substantially similar to any fuel additive used in the certification of any model year 1975 or subsequent model year vehicle or engine under section 206 of the Clean Air Act (as amended), if:

(a) Such fuel additive contains any element other than an impurity which was not specified for use, or was not typically contained, in the fuel utilized in the certification of any model year 1975, or subsequent model year vehicle or engine, or

(b) The chemical structure of the additive is not identical to the chemical structure of any additive specified for use in the certification of any model year 1975, or subsequent model year vehicle or engine.

B. Introduction Into Commerce

Introduction into commerce of a fuel additive occurs when with regard to a quantity of fuel containing such additive:

(a) No further blending, mixing, or other treatment or change to the chemical composition of the fuel will occur, and

(b) The fuel has entered into the process of shipment, such as pipeline or common carrier (whether or not owned or controlled by the manufacturer), with the purpose of selling or offering for sale.

C. Increase in Concentration

The phrase "increase in concentration" is applicable on a per refiner basis and, with respect to fuel additives, will be considered to occur if any concentration in any gallon of fuel (in grams of additive per gallon) exceeds any preceeding concentration for a fuel entered into commerce.

III. Testing Procedures

A request for a waiver should contain data relating to a fuel additive's emissions effects which are derived from vehicle testing. It is essential that test data provide a reliable basis for comparison with the conditions under which vehicles are certified pursuant to section 206 of the Clean Air Act. The various tests and conditions under which tests should be conducted are described below.

A. Use of the FTP for Exhaust Emissions Testing

For all tailpipe tests the Federal Test Procedure for 1978 and subsequent year light-duty vehicles should be used. The FTP is described at 40 CFR 86.101 et seq. Any deviations from the FTP should be reported in the application for waiver along with an explanation as to the reasons for such deviations.

B. Federal Durability Schedule

EPA has reason to believe that any alcohol-gasoline blended fuels effects which may cause or contribute to the failure of a vehicle or engine to meet emission standards will be concentration and/or time dependent. Due to this dependence, such effects may not appear during the relatively short period (3 to 4 months) over which mileage is accumulated utilizing the 50,000 mile Federal Durability Schedule (40 CFR Part 86 Appendix IV).

EPA requests information on any time and concentration dependent effects that alcohol-gasoline blends may have on automotive systems such as gaskets or othe parts of fuel systems, both metallic and nonmetallic. Further, any testing procedures which are used to determine such effects should be described in detail.

Should an applicant for a waiver choose to obtain mileage accumulation data, any deviations from the Federal Durability Schedule should be reported in the application for waiver along with an explanation of the reasons for such deviations.

C. Testing at Various Concentration Levels of Fuel Additives

Where a waiver is sought for a fuel additive, the additive's effects upon emissions performance may be critically dependent upon its concentration in use. Data submitted should encompass the range of concentrations intended for use. No attempt by EPA to extrapolate data to a permissible concentration level is contemplated.

IV. Fuel and Fuel Additive Specifications

A. Mileage Accumulation Fuel

The fuel utilized for mileage accumulation should be similar to that utilized in the certification of light-duty motor vehicles under section 206 of the Clean Air Act except with regard to the application additive. Reference should be made to 40 CFR 86.113-79(a)(2) for an example of one such fuel. Specifications for the mileage accumulation fuel should be reported in the application for a waiver along with documentation that the fuel utilized did not vary in specifications.

B. Emission Test Fuel

All emission testing should be performed using Indolene fuel except with regard to the application additive. If Indolene fuel is not used, then it is recommended that the specifications for emission test fuel contained at 40 CFR 86.113-79(a)(1) be followed. Specifications for the emission test fuel used should be reported in the application for a waiver along with documentation demonstrating that the fuel utilized did not vary in specifications.

V. Durability of Emission Control Systems and Devices

A waiver cannot be granted if a fuel additive will cause or contribute to a failure of any emission control device or system to achieve compliance with the standards over the vehicle's useful life. EPA believes that harm to emission control devices or systems which adversely affects ve-

hicle performance, such that removal or rendering inoperative of such devices or systems may be reasonably expected, should be considered a basis under section 211 (f)(4) for denying a waiver. Where the potential for such harm is evidenced, the applicant has the burden of proving that such harm will not occur.

VI. Formats for Submittal of Information

A. A separate application should be filed for each additive for which a waiver is requested.

B. The application should be in writing, signed by an authorized representative of the applicant, and clearly indicate that it is an application for a waiver pursuant to section 211(f)(4) of the Clean Air Act.

C. All information and data which is used to support a request for a waiver should be submitted at the same time. Substantive amendments (other than technical corrections of information already received by EPA) may be considered to be new applications, and the date such amendments are received may be treated as the beginning of the 180 day period specified in section 211(f)(4).

D. An application filed by more than one party is permissible and will be accepted.

E. The applicant has the burden of furnishing to EPA all data which is referenced or utilized as support for a request for a waiver.

F. Each application will receive a docket number which will be communicated to the applicant(s) along with the receipt date of the application. All correspondence should refer to the docket number.

G. A copy of each application should be submitted to: Director, Mobile Source Enforcement Division (EN-340), Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460.

H. Each application should contain the following information:

1. Fuel and fuel additive specifications for the mileage accumulation and emissions test fuel and for the fuel and/or fuel additive for which a waiver is requested and the methods of analysis.

2. HC, CO, NO_x emission values in grams/mile for each test performed.

3. Deterioration factors for each vehicle.

4. A description or reference to a description of all procedures used to test each vehicle.

5. A record and description of maintenance and other servicing performed.

6. The results of each emission test for each vehicle and the point in the durability schedule at which such vehicles were tested.

7. A description of each vehicle in the control and test fleets, including a description of their engines, emission control systems, fuel system components, and any auxiliary emission control devices.

8. Results of analysis of the actual fuel used in mileage accumulation and emission testing with respect to additive concentration, lead content, octane rating, sulfur content, phosphorus content, Reid vapor pressure, distillation specifications, and hydrocarbon composition.

9. Evidence of other physical effects of the additive for which waiver is requested on fuel system parts for the 50,000 miles of operation (e.g., indication of corrosion or material incompatibility with the additive).

10. Evidence of the physical effects of the additive for which waiver is requested on catalytic converters for the 50,000 miles of operation (e.g., pressure drop test results or other physical testing to determine extent of catalyst plugging).

Dated: April 24, 1978.

MARVIN B. DURNING,
Assistant Administrator
for Enforcement.